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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1459

UNITED STATES OF AMERICA, PETITIONER

v.

LITTLE LAKE MISERE LAND COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I. THE UNITED STATES BARGAINED FOR AND ACQUIRED A VALUABLE FEDERAL INTEREST IN AND TO THE MINERALS UNDER THE SURFACE OF THE LAND SUBJECT TO THESE CONVEYANCES

Respondents contend that "the United States has never owned the mineral rights in [the] land" involved here (Br. 28), and therefore is not in a position to complain of an application in this case of the Louisiana statute making servitudes "imprescriptible" (Louisiana Act 315 of 1940). They rely on *United States* v. *Nebo Oil Co.*, 190 F. 2d 1003 (C.A. 5), which characterized the "reversionary interest" that the government retains under a mineral reservation of the sort

involved here as "a mere expectancy, or hope" to obtain an interest in the minerals at some future date (190 F. 2d at 1009).

A. This characterization by the federal court is, we submit, contrary to the decisions of the Louisiana Supreme Court. As explicitly recognized in *Nebo Oil* (190 F. 2d at 1007), "[t]he Louisiana courts have adhered to the principle that a reservation or sale of oil and gas creates only a right to go upon the land to search for and capture minerals." Respondents themselves acknowledge that, under Louisiana law, all they obtained under the reservations in the deed of purchase and the condemnation judgment was "a servitude (easement under common law) upon the land involved" (Br. 26). And see *Leiter Minerals Inc.* v. *California Co.*, 241 La. 915, 931, 132 So. 2d 845, 850. While a mineral servitude is created through such acts as are used in the transfer of title to immovable property (*Long-Bell Petroleum Co.* v. *Tritico,* 216 La. 426, 450–451, 43 So. 2d 782, 791), the Louisiana Supreme Court has explicitly held that the servitude itself "does not transfer or reserve ownership of the minerals * * *" to or in the person thereby given access to the lands. *Hicks* v. *Clark,* 225 La. 133, 138, 72 So. 2d 322, 324. Rather, the owner of the land above is the only one who can have an identifiable interest in whatever minerals are below the surface, an interest which is not lost unless and until the minerals are actually extracted from the land by drilling operations permitted by the servitude. This is not to say that the landowner can claim a separate ownership in undiscovered minerals lying

beneath his property (*Frost-Johnson Lumber Co.* v. *Salling's Heirs,* 150 La. 756, 91 So. 207), but rather that, as pointed out by the Louisiana Supreme Court in *Federal Land Bank* v. *Mulhern,* 180 La. 627, 634, 157 So. 370, 373, "* * * those minerals, while in place in the ground beneath the surface, unsevered, are real estate, a part of the land itself, a part of the realty * * *."

Accordingly, contrary to the Fifth Circuit's decision in *Nebo,* it is not a "property interest" in the minerals that reverts to the landowner upon extinguishment of a servitude for nonuser; as respondents accurately observe (Br. 27), "'estates in reversion' are unknown to Louisiana law." Rather, the owner's reversionary interest under a servitude relates only to the *use* of the land for purposes of exploring for and extracting minerals. *Hicks* v. *Clark, supra.*[1] Whether or not that "reversionary interest" is considered an

[1] While it was held in *Hicks*, as respondents point out (Br. 27), that such a "reversionary interest" cannot be sold by the landowner except in conjunction with a sale of the land itself (see, *e.g.*, *United States* v. *Nebo Oil Co.*, *supra*), the court's reasoning was not related to the landowner's interest in the below-surface minerals. Rather, the court pointed out that a rule permitting such a sale would allow the transfer of the landowner's "reversionary interest" in the use of the land to the same person who enjoyed the servitude. Thus, that person would be in a position to extend his servitude beyond the statutory ten-year period without user by exercising his reversionary right when the servitude became extinguished for non-use. This, the court held (72 So. 2d at 325), would be "contrary to the public policy of [Louisiana] that the right to explore for * * * minerals in the absence of use reverts to the land in a period of 10 years."

"inchoate hope or expectancy," as respondents urge (Br. 34), it clearly does not detract from the purchaser's interest in the minerals below the surface "as part of the realty" under Louisiana law.

Consequently, once the conveyances involved in the present case were consummated, the United States, by virtue of its undisputed ownership of the surface rights in the land in question, had a paramount interest in the minerals below the surface, subject only to the limited servitude stipulated in the reservations. Application of Louisiana Act 315, so as to extend indefinitely respondents' already lapsed servitude to explore for, and extract, those minerals, would significantly undermine a valuable interest that the United States had bargained for and received under the conveyances, and would effectively abrogate the agreed terms of the reservations. For the several reasons we have already discussed in our main brief (pp. 16–28), such a result is constitutionally impermissible.[2]

[2] Respondents' continued reliance on *Nebo Oil* to support their contention that the decision below is consistent with the Contract Clause overlooks a fundamental difference between that case and this one. In *Nebo Oil*, the sale to the United States of the timber lands was subject to an outstanding mineral servitude in favor of a third party. The "reversionary interest" in the landowner—to take effect upon the lapse of the servitude for nonuse—was transferred to the United States. By the terms of the conveyance, the United States, while owning an inseparable estate in the below-surface minerals by virtue of its land acquisition, agreed that *its* right to explore for, and extract, the minerals—vis-a-vis the similar right of the third party under the servitude—would be controlled by the local laws of Louisiana relating to statutory prescription. Here, by contrast, the United

B. Even if the interest of the United States in the minerals involved here might, under state law, be characterized as something less than a vested property right (compare dicta in *Leiter Minerals, Inc.* v. *California Co., supra,* 241 La. at 942, 132 So. 2d at 854), that would not alter our position under the Property Clause. The United States undeniably purchased the tracts of land involved here in 1937 and 1939, and, by the terms of the conveyances, granted to the sellers a mineral servitude for a specified period of time. Whatever the technical characterization of that reservation under state law, it is clear that the United States acquired and retained at least a form of future interest in the minerals below the federal lands.[3] The interest it retained, whether deemed to take effect immediately or at some time in the future, was no less "[p]roperty belonging to the United States" (Art. IV, Sec. 3, cl. 2) than was the soil covering the minerals that had been acquired for game-refuge purposes.

Like the other great grants of legislative power in the Constitution, the Article IV power of Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging

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States made no such agreement, and thus application of Louisiana Act 315 in the present context contravenes the Contract Clause of the Constitution (and see p. 25, n. 12 in our main brief).

[3] The parties to the conveyances plainly contemplated that, whatever the nature of the grantor's interest in the below-surface minerals under the terms of the reservation, that interest would revert to the United States if, as indeed occurred, 10 years lapsed without the grantor conducting any drilling operations.

to the United States" should be broadly construed. See *M'Culloch* v. *Maryland*, 4 Wheat. 316. That constitutional grant of power would have enabled Congress, if it so chose, to legislate with respect to the regulation or disposition of the valuable mineral interest the United States had acquired here. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 331–333. And if the Constitution grants this power to Congress, it is clear under the Supremacy Clause that the State could not in terms validly prohibit Congress from exercising its constitutionally-granted power. Our submission in this case is that the State cannot accomplish the same result by attempting to usurp and exercise that power—*i.e.*, by purporting to dispose of the very property interest which the Constitution gives Congress the power to dispose of or retain.

II. THE CONTROVERSY IS TO BE RESOLVED BY APPLICABLE PRINCIPLES OF FEDERAL LAW, AND NOT BY THE LAW OF THE STATE OF LOUISIANA

A. This is, we submit, the meaning of the congressional authorization of land acquisitions of the sort involved here under the Migratory Bird Conservation Act, 16 U.S.C. 715 *et seq.* As we explain in detail in our main brief (pp. 19–23), the plan of that Act is to insulate federal interests acquired thereunder from subjection to the peculiarities of local land law.

We do not suggest, as respondents intimate in their brief (pp. 17–23), that because the Secretary of the Interior acted here pursuant to his authority under the Migratory Bird Conservation Act, the lands in

question became part of a federal enclave subject in all respects only to federal jurisdiction. The Act itself provides in relevant part that "[t]he jurisdiction of the State, both civil and criminal, over persons upon areas acquired under sections * * * of this title shall not be affected or changed by reason of their acquisition and administration by the United States as migratory-bird reservations * * *" (16 U.S.C. 715g; Pet. App. 31). And, as respondents point out (Br. 17–23), both the federal government[4] and this Court[5] have consistently recognized that the States retain legislative jurisdiction over such areas "so far as exercise of that jurisdiction is consistent with federal functions" (*Wilson* v. *Cook*, 327 U.S. 474, 486).

But this does not leave the States free to impose restrictions on the manner and extent of land acquisitions the national government can make under the Act, or, as here, to reduce the federal government's interest in property already acquired by altering local land laws. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404. The scheme of the Migratory Bird Conservation Act contemplates that the administrator of the federal program shall have full power, upon obtaining

[4] See *Federal Eminent Domain*, Sec. 32B, p. 238, reproduced at pp. 4a–5a of respondents merits brief.

[5] See *United States* v. *Carmack*, 329 U.S. 230, 240–241 n. 10.

consent from the State,[6] to acquire the land interests needed while reserving to the former owners thereof whatever access to, or use of, the acquired property that may be deemed expedient and compatible. It was pursuant to that authority, the constitutionality of which is not questioned (see *Missouri* v. *Holland,* 252 U.S. 416), that the United States acted here, and thus "[t]he validity and construction" of its conveyances containing the mineral reservations, and "their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County,* 322 U.S. 174, 183.

B. Respondents argue that to apply federal law in this context would constitute a "modification and emasculation of the prior decision of this Court in *Leiter Minerals, Inc.* v. *United States,* 352 U.S. 220 * * *" (Br. 4). Apparently, they take the position that "having called for and received the advisory opinion from the highest court in Louisiana, this Court is bound to apply Act 315 of 1940 to the mineral rights reserved in the transfers to the United States" (Br. 7). But there is nothing in this

[6] Respondents' argument, raised here for the first time in this litigation, that the State "consent" statute (Act No. 12, Louisiana Statutes of 1892) is somehow defective because it is entitled, *inter alia,* an Act "[t]o cede jurisdiction * * *" (Pet. Br. App. 33) is without substance. By its terms, the Act empowers "the United States * * * to purchase or condemn * * * land in the State of Louisiana, not already in use for public purposes * * * for * * * purposes of the government of the United States." Cf. *Swan Lake Hunting Club* v. *United States,* 381 F. 2d 238 (C.A. 5).

Court's *Leiter Minerals* decision that even remotely suggests that its request for an interpretation of the state statute was intended to have such a binding effect. Nor did the Court there give any intimation that it considered state law to be applicable in these circumstances.

Indeed, as we explain in our main brief (pp. 16–23), the weight of authority is the other way. This Court stated in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 289, that "[a]s to the rights and duties of the United States under the contracts, these are matters of federal law * * *," citing *Clearfield Trust Co.* v. *United States*, 318 U.S. 363. This principle was recently reaffirmed in *United States* v. *Seckinger*, 397 U.S. 203, 209, and has consistently been a rule of general application in the lower federal courts. See, *e.g.*, *First National Bank, Henrietta* v. *Small Business Administration*, 429 F. 2d 280, 286 (C.A. 5); *United States* v. *Stadium Apartments, Inc.*, 425 F. 2d 358, 362–363 (C.A. 9).

Respondents rely on *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, to support their contention that state law controls here. But the *Wallis* case involved wholly different circumstances. The controversy there was between two private parties concerning the assignment of an oil and gas lease. The claims against the lessee were not based on any alleged inconsistency with a federal statute, regulation or order; no challenge was made to the validity of the lease which had been issued by the United States; and

the United States was not a party to the transaction in suit. This Court concluded that state law controlled because, unlike the instant case, there was "no significant threat to any identifiable federal policy or interest * * *" (384 U.S. at 68).

In reaching a similar result in *United States* v. *Yazell*, 382 U.S. 341, on which respondents also rely, the Court again emphasized that no identifiable federal interest "will suffer major damage if the state law is applied" (382 U.S. at 352). Moreover, *Yazell* involved peculiarly unique circumstances, not duplicated here, that were "intensely material to the resolution of the issue presented" (382 U.S. at 346). There, a loan contract with the Small Business Administration had been "individually negotiated * * * with specific reference to [the] Texas law * * *" (382 U.S. at 345-346) of coverture that the SBA later sought to avoid, and there was no existing "federal statute, regulation or even any contract provision indicating that the state law would be disregarded" (382 U.S. at 350–351). The Court held that "in the circumstances, the United States is seeking the unconscionable advantage of recourse to assets for which it did not bargain" (382 U.S. at 346).

Plainly, that is not the case here. At the time these conveyances were negotiated, Louisiana law recognized both contractual and statutory prescription. The parties bargained for and agreed to mineral reservations of specified duration, and the existing federal law, *i.e.*, the Migratory Bird Conservation Act, contemplated that those reservations would be subject only to fed-

eral regulation, without regard to the vagaries of state law. The State should not now be permitted to abrogate the terms of these agreements by means of subsequently enacted legislation purporting to eliminate the prescriptive rights of the United States.[7]

C. Finally, we point out that there is no difficulty in fashioning a federal common law to apply in these circumstances; it will suffice to apply the general principles of land law applicable in most States. Mineral reservations such as agreed to in the present case, which permit the grantor to enjoy a servitude on the land for a stated contractual period, vest in the purchaser a recognized property interest in the minerals below the surface of the acquired lands.[8] That interest, consistent with the provisions of the Migratory Bird Conservation Act, is to be subject only to

[7] In *United States* v. *Burnison*, 339 U.S. 87, this Court, in sustaining an existing state statute prohibiting testamentary gifts to the United States, stated (339 U.S. at 93, n. 14): "* * * our determination does not affect the right of the United States to acquire property by purchase or eminent domain in the face of a prohibitory statute of the state.* * *" Cf. *United States* v. *Oregon*, 366 U.S. 643. Here, of course, the acquisition was not even in the face of a prohibitory statute, since Act 315 was enacted after the fact.

[8] It is, of course, well settled, that "[a]ll reversions are estates in land and all estates present or future are vested in interest." 4A Thompson, *Real Property*, § 1975, p. 379 (1961). Thus, to the extent that the law of the State of Louisiana might be construed as giving to the landowner (here the United States) less than a vested property interest in minerals below lands subject to servitude, it should not be controlling. Cf. *Burnet* v. *Harmel*, 287 U.S. 103, 110; *Nebraska* v. *United States*, 164 F. 2d 866, 867–868 (C.A. 8), certiorari denied, 334 U.S. 815.

federal rules and regulations. Congress plainly did not intend that it be reduced, diluted or defeated by an application of contradictory state laws; nor, we submit, is such a result permitted by the Constitution.

CONCLUSION

For the reasons stated herein and in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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